SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION, a state agency, Plaintiff vs. AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally-recognized Indian Tribe; and DOES I – XX, Defendants	Case No. 02AS04545 RULING ON SUBMITTED MATTER

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Introduction

This case of first impression presents the question whether a state court has the power to exercise jurisdiction over a sovereign, federally-recognized Indian tribe in an

action brought by a state agency seeking to enforce state law concerning election campaign disclosures.

The Fair Political Practices Commission (FPPC) brought this action to enforce the compliance of defendant Agua Caliente Band of Cahuilla Indians, a federally recognized Indian tribe (Tribe), with the requirements of the Political Reform Act (PRA or the Act). The FPPC seeks to enforce various components of the Act, including requirements for the disclosure of contributions to political parties, candidates for state and local elective offices and statewide ballot initiatives and requirements for the reporting of paid legislative lobbying activities. See Government Code sections 81000, et seq. In its instant lawsuit, the FPPC alleges that the Tribe's reports of its political contributions and the activities of its legislative lobbyists are untimely, incomplete, and in a form that defeats the purposes of the PRA, to protect the integrity of the State's electoral and legislative processes from the undisclosed influence of campaign contributions and lobbying activities by special interests. The FPPC asserts that judicial enforcement of the Act's requirements, in the form of injunctive relief and monetary penalties, is essential to the achievement of the Act's compelling purposes.

In response to the FPPC's action, the Tribe has moved to quash service of summons and to dismiss this action on the ground that the court lacks jurisdiction over the Tribe under the doctrine of tribal sovereign immunity from suit.

The Tribe’s Contentions

The Tribe contends that it has immunity from suit under federal common law recently affirmed by decisions of the U.S. Supreme Court. The Tribe also contends that it has not waived such immunity by its participation in the State's electoral and legislative processes, and that Congress has not abrogated the immunity in the exercise of its plenary power over Indian affairs. The Tribe argues that the Court lacks jurisdiction over it because, as a sovereign nation, it is immune from suits such as this.

The tribe does not contend that the Act does not apply to it, nor does it assert that the FPPC may not seek to enforce its provisions against it. Instead, the Tribe argues that its immunity precludes the FPPC from using the enforcement tool of a lawsuit and notes that alternative means are available to FPPC. For example, the State and the Tribe may negotiate, as they did in the case of gaming on the Tribe's reservation, an inter-governmental agreement with respect to the Tribe's reporting of its political contributions and legislative lobbying activities consistent with PRA requirements. Through its chairman and counsel, the Tribe represents to the court its willingness to engage in the negotiation of such an agreement. (See Declaration of Richard M. Milanovich, paras. 4-5; Reply Memorandum, pp. 6-8; oral comments by Art Bunce at hearing on motion to quash.) Alternatively, the State may use the reports from the recipients of the Tribe's contributions and from the lobbyists that it employs to obtain the needed information about the Tribe's political contributions and lobbying activities.

The Tribe also contends that its immunity from the FPPC's action is established pursuant to the doctrine of issue preclusion. The Tribe points to a judgment entered December 13, 1995, by the Superior Court for the County of Riverside in a suit brought by the People of California against the Tribe as well as the Palm Springs Redevelopment Agency. The judgment references the Riverside court's earlier ruling of December 31, 1994, granting the Tribe's motion to quash service of summons based on the Tribe's immunity from suit under governing case law. The Tribe, however, has not provided sufficient indication that the issue decided by the Riverside court is identical to the issue pending in this action, an essential requirement of issue preclusion. (See *Rohrbasser v. Lederer* (1986) 179 Cal.App.3d 290, 297.) Moreover, issue preclusion is inappropriate with respect to a purely legal issue, as here, in which the public has a strong interest, (See *Kopp v. FPPC* (1995) 11 Cal.4th 607, 621-622.) Therefore, this court declines to find that the Tribe's immunity from this action is established by the Riverside judgment.

The FPPC's and Amicus Common Cause's Contentions

Both FPPC and Common Cause contend that the federal common law doctrine of tribal immunity does not properly extend to this action to enforce the PRA. The FPPC emphasizes that the Tribe has "injected" itself into California political processes outside the Tribe's territory and, inferentially, beyond the scope of its sovereignty and sovereign immunity. The FPPC points out that tribal immunity has never been held

by the federal courts to extend to litigation enforcing regulatory requirements of the State's political processes, and hence, there is nothing for Congress to abrogate.

Further, according to the FPPC, the extension of tribal immunity to such enforcement litigation would impermissibly interfere with the State's regulation of its political processes in violation of the Tenth Amendment to the United States Constitution and the republican form of government assured to every State by the Guarantee Clause in Article IV, section 4, of the United States Constitution. The FPPC asserts that such immunity from suit could not be the valid subject of any congressional enactment in light of the Tenth Amendment and the Guarantee Clause.

Amicus curiae California Common Cause also contends that the Tribe's participation in California's political processes through campaign contributions and lobbying activities, with knowledge that disclosure of the contributions and lobbying is a condition of such participation, constitutes a clear waiver of the Tribe's immunity from FPPC's action to enforce the PRA.

The Common Law Doctrine of Tribal Immunity

The federal common law doctrine of tribal immunity from suit developed as an aspect of tribal sovereignty, a political status recognized in early decisions of the U.S. Supreme Court. These early decisions characterized Indian tribes as "domestic dependent nations" whose sovereignty pre-existed the formation of the United States and was subject to abrogation or diminution only by the federal government, not by the States. (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1;

Worcester v. Georgia (1832) 31 U.S. 515, 530, 561; *Middletown Rancheria v. Workers' Comp. Appeals Bd*. (1998) 60 Cal.App.4th 1340, 1346-1347, citing *Bloisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1147-1148.) The sovereignty of the Indian tribes derived from their pre-existing indigenous rights to land and powers of self governance. (See *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 55 (citing *Worcester, supra*: United States has long recognized Indian tribes as distinct, independent political communities retaining their original natural rights).)

Subsequent decisions of the U.S. Supreme Court recognized that immunity from suit was an essential attribute of tribal sovereignty. Absent congressional legislation authorizing suits against the Indian tribes, the tribes were held to be exempt from suit under the "public policy that exempted dependent as well as dominant sovereignties from suit without consent." (*United States v. United States Fidelity and Guaranty Co*. 309 U.S. 506, 512 (*USF&G*) (citing *Turner v. United States* (1919) 248 U.S. 354, 358; *Cherokee Nation v. Georgia supra*; *Adams v. Murphy* (8th Cir. 1908) 165 F..304, 308; *Thebo v. Choctaw Tribe of Indians* (8th Cir. 1895) 66 F. 372, 373. See also *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla*. (1991) 493 U.S. 505, 509 (*Potawatomi*) (Indian tribes are domestic dependent nations that exercise sovereign authority; suits against the tribes are thus barred by sovereign immunity); *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58; *Puyallap Tribe, Inc. v. Department of Game of Wash*. (1977) 433 U.S. 165, 167

(*Puyallap*).) The immunity was recognized as necessary to the protection and promotion of tribal self-governance and development. (See *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C*. (1986) 476 U.S. 877, 890-891 (common law sovereign immunity possessed by an Indian tribe is a necessary corollary to Indian sovereignty and self-governance).)

The doctrine of tribal immunity from suit is definitively stated in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*: (1998) 523 U.S. 751, 754: "As a matter of federal [common] law, an Indian Tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." The doctrine applies comprehensively to suits arising from tribal activities, whether the activities occur within or outside of tribal territory and whether the activities are commercial in nature or entail noncompliance with state and local laws. (*Id*. at pp. 754-755, citing *Puyallap* and *Potawatomi*.) The doctrine even applies to bar a suit to enforce compliance with state regulations otherwise within the authority of the state to impose on tribal activities: "There is a difference between the right to demand compliance with state laws and the means available to enforce them." (*Id*. at p. 755, citing *Potawatomi*.)

The U.S. Supreme Court in *Kiowa* expressed misgivings about the adequacy of the legal basis of the doctrine of tribal sovereign immunity from suit and questioned whether the doctrine's original rationale of promoting nascent tribal governments from encroachments by the states had continuing

relevance. (*Id.*, at pp. 756-758.) Indeed, the Court noted that the doctrine "developed almost by accident." (*Id.* at p. 757.) Nonetheless, the court declined to revisit its earlier decisions and abrogate the doctrine as "an overarching rule." (*Id.*, at pp. 758, 760.) Instead the court deferred to Congress as the appropriate branch of the federal government to determine in its legislative process the extent to which tribal immunity from suit should be abrogated or restricted. (*Ibid*. See also *Potawatomi*, *supra*, 498 U.S. at p. 510 (noting that doctrine of tribal sovereign immunity affirmed in U.S. Supreme Court cases was within congressional authority to abrogate; Congress had consistently approved immunity doctrine and authorized suits against tribes only in limited circumstances).)

Discussion and Analysis

The question to be decided here is whether the U.S. Supreme Court's decisions on the doctrine of tribal sovereign immunity from suit mean that this court must find that the doctrine immunizes the Tribe from an action brought by the FPPC to enforce the PRA.

At the outset, the Court finds no waiver of tribal immunity by virtue of the Tribe's participation in California's political process. Under applicable case law voluntary participation in an activity that is the subject of state regulation and enforcement does not constitute a waiver of tribal immunity from enforcement by suit. (See, e.g., *Potawatomi*, *supra*, 498 U.S. at p. 509, citing *USF&G* (filing

civil action does not waive immunity from counterclaim based on same subject matter); *Hagen v. Sisseton-Wahpeton Community College* (2000) 205 F.3d 1040, 1044 (assurances given by tribal college to comply with Title VI civil rights requirements as condition of funding did not waive tribal immunity from terminated employees' discrimination suit); *Florida v. Seminole Tribe of Florida* (11th Cir. 1999) 181 F.3d 1237, 1243 (tribe's election to engage in gaming subject to regulation under federal Indian Gaming Regulatory Act did not waive tribe's immunity from State's suit to compel compliance with IGRA requirement that tribe enter into gaming compact with State before engaging in class III gaming).)

Instead, an effective waiver of tribal immunity from suit must be clearly and unequivocally expressed. (See *C & L Enterprises v. Potawatomi Indian Tribe* (2001) 532 U.S. 1589, 1597 (waiver of tribal immunity from suit on contract between tribe and construction contractor where contract arbitration clause and related language provided for judicial entry of arbitration award) Cf. *Guthrie* v. *Circle of Life* (176 F.Supp.2d 919, 924-925 (finding that tribe's acceptance of funds under federal special education program did not waive tribal immunity from suit for damages by parents of child receiving special education services from tribal school but discussing cases holding that participation in statutory scheme may waive tribal immunity from suit for limited purpose of determining compliance with statutory scheme.)

Thus, the Tribe's contributions to political campaigns and employment of legislative lobbyists made outside the statutory framework of the PRA, though quite extensive, are insufficient by themselves to effectively waive the Tribe's immunity from the FPPC's enforcement action. Only conduct or language by the Tribe clearly accepting the PRA requirements and judicial enforcement of those requirements as a condition of its political contributions and lobbying activities would constitute an effective waiver.

Further, the court finds that the Minnesota state court decisions cited by the FPPC do not provide persuasive authority for the proposition that the doctrine of tribal immunity is not applicable when a state seeks to regulate its political processes. In *State of Minnesota v. Red Lake DFL Committee* (Minn.Sup. 1981) 303 N.W.2d 54, there is no indication that the doctrine of tribal immunity from suit was raised by the Red Lake DFL Committee or that the Committee was sued as a tribal agent to whom the doctrine might apply. In *Shakopee Mdewakanton Sioux v. Minnesota Campaign Finance and Public Disclosure Board* (1998) 586 N.W.2d 406, the Indian Tribe brought the suit to enjoin enforcement of the campaign finance laws against the tribe. As in *Potawatomi*, *supra*, the application of a state regulatory law to an Indian tribe is not determinative of the tribe's immunity from suit to enforce the law against the tribe.

The court also notes that the evidence offered by the FPPC regarding the compliance of other California Indian tribes with the PRA and the compliance of Minnesota,

Wisconsin, and Connecticut Indian tribes with comparable state laws is not pertinent to the determination of whether the Tribe is immune from the FPPC's enforcement action. The voluntary compliance of other Indian tribes may have been based on a variety of pragmatic considerations separate and apart from the legal availability of tribal immunity as a bar to suits for the enforcement of the PRA and simmilar legislation in other States.

That said, the court does find that the tribe is not immune from the FPPC's action to enforce the PRA reporting requirements for its political contributions and legislative lobbying activities. The U.S. Supreme Court in ***Kiowa*** held that the doctrine of tribal immunity encompasses suits arising from the governmental as well as economic activities of a tribe within and outside of tribal territory. The Court also recognized that prior decisions offered no more than "a slender reed for supporting the principle of tribal sovereign immunity." 523 U.S. at 757. Pertinent decisions recognizing the doctrine have concerned activities affecting tribal self-governance and economic development, not activities affecting the governance and development of another sovereign. (See, e.g., ***Potawatomi***, ***supra*** (immunity from state's judicial enforcement of tribe's obligation to collect tax on cigarette sales on tribal territory); ***Puyallup, supra*** (immunity from suit for tribal fishing within and outside reservation).)

No case has held that a tribe is immune from suit for activities that, instead of promoting tribal self-governance

and development, are intended to influence a sovereign State's electoral and legislative processes. Nor does any case suggest that the federal common law of tribal immunity was meant to apply to a suit by the State to enforce its laws regulating all persons who seek to influence the State's political processes. Rather, the U.S. Supreme Court has recognized that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." (See *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148-149 (citing cases); *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1158.) Where, as here, no federal law addresses the State's regulation of its electoral and legislative processes with respect to Indian tribes, the State may properly regulate Indian tribes along with all other persons pursuant to the requirements and enforcement mechanisms of the PRA designed to protect the integrity of the State's political processes, including the mechanism of judicial enforcement. Such enforcement does not fall within the scope of tribal self-governance and development protected by the doctrine of tribal immunity.

Moreover, were any federal law to extend the doctrine of tribal immunity to state laws like the PRA, it would impermissibly conflict with the Tenth Amendment and Guarantee Clause of the United States Constitution. Such federal law would intrude upon the State's exercise of its reserved power under the Tenth Amendment to regulate its electoral and

legislative processes and would interfere with the republican form of government guaranteed to the State by Article IV, section 4 of the United States Constitution. (See *Gregory v. Ashcroft* (1991) 501 U.S. 452, 461-463.)

The requirements of the PRA for the reporting of large campaign contributions and legislative lobbying activities, which are designed to assure that the State's political processes are free from the influence of anonymous wealthy interests and that the electorate is informed about such influence when voting for political candidates and initiative measures, fall squarely within the State's reserved power to regulate its political processes and protect the integrity of its republican form of government. (Cf. *Buckley v. Valeo* (1976) 424 U.S. 1, 14.). In *Buckley*, the United States Supreme Court upheld the constitutionality of the federal campaign contribution disclosure law. The Supreme Court noted that such a requirement served to protect the integrity of the political process and fostered informed political debate on qualifications of candidates that is integral to the system of government established by U.S. Constitution. (*Ibid*.)

The Supreme Court in *Buckley* emphasized the importance of a campaign disclosure requirement in observing that the governmental interests vindicated by such involve “the ‘free functioning of our national institutions.” (424 U.S. at p. 67.) The Court noted that the “sources of a candidate's financial support. . .alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.”

(*Ibid*.) The Court also recognized that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." (*Ibid*.) The Court further noted that "disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations. . . ." (*Id*. at p. 68.)

The FPPC here seeks to do no more than to timely and effectively enforce disclosure requirements for contributors to the State's election and legislative process of the type that were specifically upheld by the United States Supreme Court in *Buckley*. As set forth in the findings on which the enactment of the PRA was based:

> "(a) State and local government should serve the needs and respond to the wishes of all citizens equally, without regard to wealth;
>
> "(b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of the persons who have supported them; . . .
>
> "(f) The wealthy individuals and organizations which make large campaign contributions frequently extend their influence by employing lobbyists and spending large amounts to influence legislative and administrative actions;
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> "(g) The influence of large campaign contributors in ballot measure elections is increased because the ballot

pamphlet mailed to the voters by the state is difficult to read and almost impossible for a layman to understand; . . . ." (Gov. Code § 81001. See also Gov. Code 81002 (purposes of PRA); *Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528, 532 ("manifest purpose of the financial disclosure provisions of the [PRA] is to insure a better informed electorate and to prevent corruption of the political process").)

If large contributors to the electoral and initiative process -- like the Tribe -- were not subject to FPPC enforcement actions, the institutions and processes of California's government would be subverted to a significant extent. For the PRA to effectively work as intended, it must apply equally to all with no exceptions, even those based on First Amendment rights. (See Gov. Code § 84400 and legislative history thereto set forth in Declaration of Robert M. Stern in Opposition to Motion to Quash, paras. 8-11; *Griset v. Fair Political Practices Com.* (1994) 8 Cal.4th 851, 860-861; *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 464-465. See also *Buckley v. Valeo, supra,* 424 U.S. 1, 81-82.) All must be subject to the same enforcement remedies for violations of the PRA reporting requirements, and the State must have the ability to swiftly remedy any and all violations by judicial relief.

Were the Tribe immune under federal law from judicial relief for violations of the PRA requirements, the State's exercise of its reserved power to regulate and preserve the integrity of its electoral and legislative processes would be

seriously compromised and restricted. Concurrently, the provisions of the Tenth Amendment and Guaranty Clause would be contravened. (See *New York v. United States* (1992) 505 U.S. 144 (Federal Government may not compel State to adopt federal regulatory program). Cf. *Blount v. S.E.C.* (D.C.Cir. 1995) 61 F.3d 938, 949, citing *Garcia v. San Antonio Metropolitan Transit Authority* (1995) 469 U.S. 528, 554.).)

Decision

The Court determines that it is empowered to exercise jurisdiction over the Tribe to decide the important issues raised in this case. The Court rejects the assertion that the doctrine of tribal immunity applies here to insulate the Tribe from the jurisdiction of California state courts to enforce state laws designed to protect the integrity of state legislative and electoral process.

This decision is not intended to and does not affect tribal immunity as it has developed thus far. Issues concerning tribal self-governance, commercial transactions, economic development or self-sufficiency are not in any manner impacted by this decision. (See *Kiowa, supra*, 523 U.S. at pp. 754-758.) The court distinguishes what is involved here from the "governmental" activity of seeking to collect taxes on cigarettes sold on tribal lands (see *Potawatomi*, *supra*), as well as immunity from suit for off-reservation torts. (See *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384.)

Instead, this Court determines that the federal common law does not extend immunity to Indian tribes from suits

alleging that they have violated state laws designed to protect the integrity of the State’s own political processes, i.e., those laws that specifically regulate the tribes' campaign contributions and legislative lobbying activities. The State has a sovereign interest reserved by the Tenth Amendment to the United States Constitution in overseeing its political processes that elect representatives, amend the State’s constitution, and enact legislation. No principle of federal law overrides this interest.

The Tribe's motion to quash is denied. This court has jurisdiction to decide the narrow questions presented. The Tribe is ordered to file its responsive pleading to the complaint of the FPPC no later than March 31, 2003.

Dated:

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LOREN E. McMASTER
Judge of the Superior Court